No. 92-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Petitioners,
v.
JOHN L. BAGWELL; CLINCHFIELD COAL CO.; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITIONERS' REPLY BRIEF

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ARGUMENT

In tacit recognition that the questions presented in the *certiorari* petition *are* substantial and the reasons for granting the petition stated therein *are* telling, the brief in opposition labors on for 30 pages—the maximum permitted by this Court's rules—in an effort to show that the decision below is clearly correct and is of little moment.

On analysis of those many pages, what the opposition brief does is to confirm our contention that, as to the first question presented, the Virginia Supreme Court's decision—and the decisions cited therein—rest on a *rejection* of this Court's jurisprudence setting out the constitutional line between civil contempt and criminal contempt and offers as a substitute a clearly inferior juris-

prudence; and to obfuscate rather than to confront the issues posed by the second and third questions presented.

A. The Mandatory/Prohibitory Dichotomy

The opposition brief—while expending much ink and effort—fails to rebut our basic point that: (a) the law in this Court is that, in determining the essential nature of a contempt proceeding, a mandatory/prohibitory dichotomy is "sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] nature of the punishment," *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911); *Hicks v. Feiock*, 485 U.S. 624, 631 (1988); and (b) the lower court's decision in this case—which states that this Court's mandatory/prohibitory dichotomy "presents a distinction without a difference"—is symptomatic of the general propensity in the lower courts to treat the governing rules stated by this Court as an irrelevance. Compare Pet. at 16-18 with Opp. Br. at 16-22.[1]

[1] In what is obviously a red herring, respondent suggests that "this case does not clearly present the mandatory/prohibitory issues." Opp. Br. at 23-24. The thrust of respondent's argument is that even if this Court were to hold that the trial judge unlawfully imposed civil contempt sanctions against the Union for violating *prohibitory* directives, that would not change the result in this case because the Union was held in contempt for violating *both* mandatory and prohibitory directives. This argument misapprehends the facts and the law.

Of the $52 million in contempt fines respondent seeks to collect, a *maximum* of $7.1 million could even arguably have had anything to do with findings concerning violations of mandatory directives. *See* App. 55a, 61a, 64a, 71a, 83a, 97a, 102a. We submit that a stake of $45 million makes this case one which provides a more than adequate base for addressing the continuing vitality of the mandatory/prohibitory dichotomy.

And, even assuming—contrary to fact—that the Union was fined $52 million for an indivisible mixture of violations of mandatory and prohibitory directives, the full amount of such fines would have to be vacated if this Court determined that any significant portion was imposed without observance of constitutionally-required procedures, as obviously would be the case here where the overwhelming majority of the judicial directives violated were prohibitory.

Indeed, pp. 16-22 of the opposition brief—which set out the lower court cases that have made this trend—provides chapter and verse for the proposition that those decisions are studies in evading *Gompers'* and *Hicks'* plain lesson rather than in elaborating or applying that lesson. Having said that much, we hasten to add that respondent's assertion that there is uniformity of approach and result in the lower court decisions on the proper characterization of contempt proceedings growing out of violations of prohibitory injunctions is misleading.[2]

It is equally to the point that the opposition brief is conspicuously silent regarding our demonstration of the important constitutional purposes served by the mandatory/prohibitory dichotomy. The dichotomy, as we have explained, limits a judge's discretionary authority to impose contempt sanctions through civil contempt proceedings—proceedings in which *none* of the constitutional requirements for a criminal proceeding need be followed—to the *narrow class of situations* in which a party is presently in violation of a court order to perform discrete affirmative acts within a discrete time period specified therein. Those situations are singular in providing a particularly strong justification for swift procedures and flexible remedies, in allowing the defendant to bring an end to the punishment (and to purge himself of contempt) at any

[2] While the *trend* in the lower courts is to the contrary, the lower courts have neither uniformly rejected the mandatory/prohibitory dichotomy, *see In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987), nor uniformly embraced the view that the imposition of prospectively-set, coercive contempt fines constitutes civil contempt, *see Crozier-Chester Med. Center v. Moran*, 560 A.2d 133 (Pa. 1989) (holding that imposition of scheduled fines for future violations of court's prohibitory order constitutes criminal contempt). And, while the lower courts generally conclude that the imposition of prospectively-set sanctions to coerce compliance with a prohibitory injunction is civil contempt, this result is reached via reasoning that is far from uniform, *see* Pet. at 16-18.

time through compliance, and in being foreign to the traditional law of crimes.

Thus, the dichotomy ensures that a clear boundary between civil contempt and criminal contempt is maintained and that the lower courts' demonstrated tendency to expand civil contempt at the expense of criminal contempt is cabined. *See* Pet. at 12-14, 18.

In place of *Gompers* and *Hicks,* the opposition brief—and the lower court decisions cited therein—would have it that where a party violates a prohibitory order that sets out a stated penalty for its breach, the judge may impose that penalty in civil contempt proceedings, but that where a party violates a prohibitory order that does not state a penalty for its breach, criminal procedures must be provided before sanctioning the wrongdoer. Opp. Br. at 15-18.

There is, we readily admit, *a* distinction between imposing a scheduled penalty following a violation of a court order and imposing an unscheduled penalty following such a violation. The two are not so similar as to be one for all purposes. But that distinction is *not* generated by—and does *not* provide—any principled basis for distinguishing civil contempt from criminal contempt grounded in the history or the logic of constitutional due process, of contempt law or of the civil law and the criminal law in general.

To the contrary, history teaches that the imposition of scheduled penalties for specified prohibited conduct is generally the province of the *criminal* law. And, this Court's decisions teach that the province of the criminal law is generally the province of *criminal contempt. See* Pet. at 13. The proposition that the fines here were scheduled, then, provides no reasoned basis for the proposition that the contempt proceedings here are properly characterized as civil.[3]

[3] Contrary to respondent, Opp. Br. at 23, the justification for limiting application of the mandatory/prohibitory dichotomy to *judicially-imposed* contempt sanctions is both "apparent" and "principled." Unlike judges in contempt proceedings, legislatures or administrative agencies imposing fines for prohibited conduct are not acting as judges in their own cause, seeking to prevent or remedy what may be perceived to be a personal disrespect or insult. *See Bloom v. Illinois,* 391 U.S. 194, 202 (1968) ("[c]ontemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament").

In sum, the scheduled fine/unscheduled fine dichotomy embraced by the Virginia Supreme Court—and by the respondent—is a classic example of the distinctions without a difference that characterize bad law.

B. The Continued, Public Prosecution of "Civil" Contempt Orders After The Final Settlement Of The Main Civil Action

As explained in our petition, under the principles stated in *Gompers, supra,* 221 U.S. at 441, and *Hicks, supra,* 485 U.S. at 631—and under *Gompers'* square holding—a civil contempt proceeding, as a proceeding to further the remedial ends of a private civil complainant, *must by its nature end with the full settlement of all underlying civil claims*; the proceeding may not, within its civil character, be taken over by a court to be independently prosecuted solely to further the purpose that is the traditional province of *criminal* contempt, *viz.,* to vindicate the court's own authority.[4] And, as we also explained, the decision of the court below—empowering the courts of Virginia to take over a fully settled civil contempt case for just such continuing and independent prosecution by a court appointed officer—is in the plainest conflict with

[4] *See, e.g., Gompers,* 221 U.S. at 452; (a civil contempt proceeding, unlike a criminal contempt proceeding, "necessarily end[s] with the settlement of the main cause of which it is a part"); *id.,* at 445 (civil contempt proceedings, unlike criminal contempt proceedings, are "treated as a part of the original cause in equity" because the private civil complainant prosecutes the case "in its own right . . . and not as a representative of the [government] prosecuting a case of criminal contempt; criminal contempt proceedings, in contrast, are "between the public and the defendant, . . . with the defendant on one side and the court vindicating its authority on the other").

Gompers. The decision below, moreover, is indicative of a trend of lower court decisions holding that, notwithstanding *Gompers*, courts *do* have the authority to independently prosecute *civil* contempt proceedings solely to vindicate their own authority. *See* Pet. at 26-28 (reviewing recent lower court decisions).

That the instant contempt actions are now being prosecuted *solely* to vindicate the authority of the trial court is most clearly demonstrated by the fact that respondent Bagwell—the court appointed officer who was not a party in the original civil action—appears to be the *only* respondent to have filed any brief in this Court in response to the petition. The private-party respondents—each of whom has fully settled all original claims—although served with the petition, have expressed no continued interest in the case.

Nevertheless, less than three pages of the opposition brief are devoted to the issues presented by the full settlement of the original civil action. *See* Opp. Br. at 25-27. This becoming reticence is easily explained in that none of the points made there have any merit.

1. Respondent's principal argument is that no federal question at all is raised by the state practice at issue here because a state may adopt its own rules of mootness, which need not accord the same significance to civil settlements as would the federal law of mootness. Opp. Br. at 25-26. This argument ignores the nature of the federal question presented in the petition.

The federal question we present does *not* rest on any novel view that the federal law of mootness must apply to the states. Rather, that question rests on the well-established principle that the states must respect federal due process rights and, because of that obligation, must respect the constitutional distinction between contempt proceedings that are in their essential character civil (because the proceedings are "remedial, and for the benefit of the complainant") and contempt proceedings that are in their essential character criminal (because the pro-

ceedings are "punitive, to vindicate the authority of the court"), *Gompers, supra*, 221 U.S. at 44; *Hicks, supra*, 485 U.S. at 631.

This Court has been unmistakably clear that in the context of state contempt proceedings, "the characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." *Hicks, supra*, 485 U.S. at 630.

All this being so, the argument that we have failed to raise a substantial federal question is not even colorable.[5]

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[5] The three decisions of this Court cited in the opposition brief to support the argument that no federal question is raised by the trial court's independent prosecution of contempt proceedings after the settlement below are wholly irrelevant to any point at issue here.

First, Juidice v. Vail, 430 U.S. 327, 335-36 & n.12 (1977), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), are cited for the proposition that federal courts may not interfere with state contempt processes, implying that those processes may be administered without regard to this Court's law regarding the proper bounds of criminal and civil contempt. Opp. Br. at 25. But neither of these cases in any way question the applicability of federal due process law to state contempt proceedings. Rather, both concern the procedural propriety of federal courts directly enjoining pending state contempt proceedings. Far from freeing state courts from the substantive rules of federal due process law, those cases disapproved of such federal injunctions precisely because state courts *were* fully bound by—and could be trusted to follow—the substance of federal due process law. *See, e.g., Juidice*, 430 U.S. at 336-337; *Huffman*, 420 U.S. at 604.

Second, taking language from *Orr v. Orr*, 440 U.S. 268, 275 n.5 (1979) entirely out of context, the opposition brief (at 25) asserts that the case "recogniz[es] that the survival of a state court contempt judgment 'depends upon the resolution of somewhat knotty state-law problems.'" The cited discussion in *Orr* concerned only the issue of whether the state law regarding stipulations might provide an adequate and independent basis for upholding the validity of a particular civil contempt judgment that had been imposed on the basis of an allegedly unconstitutional statute, since the defendant had specifically entered a stipulation that he would perform the obligations at issue. The case exclusively concerned the constitu-

2. The opposition brief next argues, in one brief paragraph, that "[e]ven if, . . . federal law governed" the issue here, the rule of *Gompers* would have no application since that case involved a "compensatory" contempt order that was "remedial" in nature, not a "coercive" contempt order that need not be "remedial." *See* Opp. Br. at 27-28.

While respondent simply ignores the petition, we had anticipated this argument—which rests on the erroneous premise that "coercive" civil contempt orders need not be "remedial" in nature—and had demonstrated its fatal flaw. Since the opposition brief offers no surrebuttal we set out that portion of the petition in the margin for the Court's convenience.[6]

3. Finally, respondent asserts, quoting the opinion below, that "[c]ourts . . . must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained." Opp. Br. at 27 (*quoting* Pet. App. 17a). A rule that private parties could settle such civil contempts, according to respondent, "totally undermines the effectiveness of civil contempt fines intended to coerce a party to comply with the court's legitimate orders." Opp. Br. at 27.

tionality of the statute in question and had absolutely nothing to do with any issue relevant to the instant case.

[6] The entirety of the Virginia Supreme Court's effort to distinguish *Gompers* in this regard is that court's brief assertion that the monetary relief at issue in *Gompers* was "compensatory relief to be paid to the complainant," so that *Gompers* did not involve "coercive, civil contempt sanctions." App. 18a.

The *Gompers* opinion, however, does not even hint that a distinction between different kinds of civil contempts should make a difference regarding the ability of the parties to settle their dispute. To the contrary, *Gompers* rests its conclusion regarding the effect of settlement on the proposition that civil contempt—as distinct from criminal contempt—is a "remedial" proceeding, "for the benefit of the complainant," and *not* a proceeding "to vindicate the authority of the court" . . . . [221 U.S. at 441.] And, the *Gompers* Court made it quite clear that this distinction obtains where the civil contempt order can be termed "coercive" and where it can be termed "compensatory." Such a "coercive" civil contempt order is "not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do" and thereby benefiting the civil complainant. 221 U.S. at 442. [Pet. at 21-22.]

Far from undercutting the points in our petition, this alarmist argument illustrates the need for this Court's review. It is *this Court's* jurisprudence that when a judge exercises contempt power solely to uphold the authority and dignity of the court, the judge is exercising *criminal* contempt power. *See* Pet. at 20-23. The fact that the *Constitution* grants a defendant added procedural protections when faced with a trial judge's determination to invoke the criminal contempt power neither renders the criminal contempt power ineffective nor justifies a license to the trial courts to substitute civil contempt as a less burdensome alternative.

The insistence that a trial judge must be able to avoid the restrictions inherent in criminal contempt whenever the court believes it necessary to do so to vindicate its authority and dignity is nothing but an insistence that the constitutional balance that underlies criminal contempt, as this Court has set that balance, be set askew. And, the assumption that the dignity of the courts will be jeopardized by respecting the due process rights of those who are accused of undermining judicial authority is an unworthy assumption that this Court has squarely rejected:

> We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked

out over the centuries. [*Bloom v. Illinois*, 391 U.S. 194, 208 (1968).][7]

CONCLUSION

For the reasons stated in the petition for a writ of *certiorari* and in this reply brief, the petition should be granted.

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[7] Respondent's treatment of our third question presented—which raises issues under the Eighth and Fourteenth Amendments relating to the excessiveness of the $52 million in contempt fines levied in this case—consists of misstating the record and misstating our claims. Starting from these misstatements, respondent argues that the cases currently pending before this Court that raise excessive fines issues are wholly unrelated to the instant case. *See TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992) (raising issues regarding what might constitute excessive fines under the Due Process Clause of the Fourteenth Amendment); *Austin v. United States*, No. 92-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993) (raising issues regarding what might constitute excessive fines under the Excessive Fines Clause of the Eighth Amendment).

First, respondent asserts that the courts below were "not called upon to address the question" of whether these fines violated "the Excessive Fines Clause of the Eighth Amendment." Opp. Br. at 28; *see also* Opp. Br. at 29. This assertion is wrong. Petitioners *expressly raised* this very issue in the proceeding below. *See* Brief for Appellant, Supreme Court of Virginia, Record No. 92-0299, at 21 n.23 ("By parity of reasoning [to the issue raised by petitioners concerning excessive fines under the Due Process Clause of the Fourteenth Amendment], the fines imposed are so unreasonably large as to violate the excessive fines clauses of the Eighth Amendment to the United States Constitution.").

Second, respondent notes a variety of arguable factual differences between the instant case, on the one hand, and *TXO Production Corp.* and *Austin* on the other. The point that respondent ignores, however, is the *only* point of consequences, and the *only* point we argued, *viz.*, that the instant case raises excessive fines issues that, whatever the differences may be, are closely related to those raised by *TXO* and *Austin*, so that proper evaluation of the excessive fines issues raised by this case should benefit from, and therefore should await, this Court's dispositions of the issues in *TXO* and *Austin*.

Respectfully submitted,

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